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In the Supreme Court

OF THE

United States

OCTOBER TERM 1971

No. 71-351

PSG Co., an Oregon Corporation, *Petitioner*

vs.

EL SALTO, S.A., Escuintla, Guatemala, C.A.,
Respondent

PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

Pursuant to Rule 24 of the Supreme Court Rules, Petitioner PSG Co. presents herewith its reply to the "Brief of Respondent in Opposition" to our Petition for Writ of Certiorari.

Respondent's brief fails to comply with Rule 40 of the Rules of this Court in that it has no logical ordering or arrangement or topical headings; this reply to that brief therefore must attempt to extract from

Respondent's discursive invective, whatever comments, wherever found, which seem to have some actual relevance to the questions brought before this Court by the instant petition.

Since Respondent's brief is further in violation of Rule 40 of this Court in failing to support its alleged statements of "fact" with references to the record we are compelled to trouble this Court with refutations of the same, with proper record references, where important.

II.

JURY TRIAL

Our Petition for Writ of Certiorari (pp. 7-16) argued that Petitioner was denied its fundamental constitutional right to a jury trial; that the trial court erred grievously when, prior to the trial, it ordered judgment in favor of Respondent, El Salto, on the Robinson-Patman claim; that the Court of Appeals erred, first, in affirming such order on the basis of a pre-trial stipulation, and, secondly, compounded the error in its amended decision by affirming such judgment on the basis of evidence introduced during the trial. We there cited a host of decisions of this Court and of other Courts of Appeals in conflict with such decision.

If we understand correctly, Respondent's answer (p. 4) seems to be that the decision was right because "there never was any question as to the facts." Respondent thus delicately avoids the heart of the mat-

ter, namely, that the trial court disposed of this issue BEFORE trial, so that there never was any opportunity to present facts on the point. In our petition for Writ of Certiorari (pp. 14-16) we itemized the *host* of factual issues concerning the Robinson-Patman claim which were before the Court at the time it ordered judgment; not one word concerning any of them appears in Respondent's brief.

Respondent's brief (p. 4) glibly asserts:

> "PSG's dual agent-buyer status was agreed to by the parties before the trial * * *."

Respondent does not favor us with a reference to the record to support this remarkable statement; plainly and simply, it is not so. The facts to the contrary on the point, each of which *is* supported by references to the record, are carefully set forth in our Petition for Writ of Certiorari at pp. 13-16; not one word concerning any of them appears in Respondent's brief.

Respondent's brief (p. 14) asserts:

> "In short, as the Court of Appeals found, there was no real issue for the jury to decide * * *."

Again, no record reference appears to support the statement. The fact is to the contrary. The Court of Appeals found that the issue was resolved during trial as a contested issue on evidence introduced during the trial. In its Order on Petition for Rehearing (See our Petition for Writ of Certiorari, p. xiv) the Court of Appeals said:

> "The agreed facts *and the facts later adduced at the trial* adequately established that PSG acted as

a buyer, and that it received commissions from El Salto." (Emphasis added)

We respectfully submit that Respondent's brief, by its pointed omissions, corroborates our contention that the *pre-trial* Robinson-Patman judgment denied PSG Co. its right to a jury trial.

If the instant decision be allowed to stand, it will stand for, and be cited for, the proposition that a trial court may take from a jury whatever part of a case it wishes, even before any evidence whatsoever has been introduced.

III.

ILLEGALITY

Our Petition for Writ of Certiorari argued (pp. 16-18) that the instant decision erred in simultaneously awarding El Salto treble damages because the contract between the parties was allegedly in violation of the Robinson-Patman Act and, in addition, allowed El Salto full recovery on that contract. No authority allows such quadruple (treble plus one) recovery.

Respondent's brief (p. 3) cites no authority whatsoever to support the challenged decision. The *only* authority cited in Respondent's entire brief is that of *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743. That case allowed a relatively innocent seller to recover on a contract which violated Robinson-Patman; it did *not* permit the seller to recover, *on top of the contract price,* treble damages; the decision

clearly suggests that a party *cannot* have both remedies.

If the instant decision be allowed to stand, it cannot help but become authority for the rule that a contract in violation of Robinson-Patman will entitle one party to that contract to quadruple damages against the other, depending upon who sues first!

IV.

SUPERSESSION

Our Petition for Writ of Certiorari (pp. 18-19) argued that the trial court erred in submitting the question of supersession to the jury and that the Court of Appeals erroneously overlooked this point in its decision.

Respondent's brief (p. 2) confirms the fact that the Court of Appeals did not discuss or rule on this point, although it was there argued. On the merits, Respondent, in a grand manner, disposes of the same with the *sole* assertion that this is a matter of "local law."

While Respondent, a Guatemala corporation, may consider matters of "local law" as trivia, this Court not infrequently finds matters of "local law" not to be beneath *its* dignity.

V.

PAROL EVIDENCE

Our Petition for Writ of Certiorari (pp. 20-21) argued that the trial court erred in admitting parol evidence to vary the clear terms of a contract. That contract, of April, 1965 (Appendix D to our Petition for Writ of Certiorari), recited that El Salto was indebted to PSG Co. in the amount of $300,000.00; the trial court permitted El Salto's president to testify that there was no such debt (Tr. 413-414) upon the specific ground that PSG Co.'s president had been permitted to testify concerning antecedent transactions and that, therefore, El Salto should be permitted to do so.

The Court of Appeals affirmed the ruling on a totally different ground (Appendix A to our Petition for Writ of Certiorari, p. vi) namely, that of alleged "latent ambiguity" in the said April contract. In our Petition for Writ of Certiorari (pp. 20-21) we contended that the acknowledgment of indebtedness was so clear as to preclude any possibility of ambiguity.

Respondent's brief (p. 2) argues that the point is moot because the District Court and the jury found that the contract had been superseded. Again, no citation to the records is given to support the statement. We are unaware of *any* factual determinations made by the trial court, other than the Robinson-Patman decision, discussed above. The jury *did* find, with regard to the said April contract, that Petitioner *did undertake obligations thereunder* (R. p. 102, lines 23-26).

Respondent's brief (p. 3) concludes on this point with the remark that "the jury's answer to Special Issue No. 4 settled the matter", i.e., the jury's finding (R. p. 100, lines 27-31) that there had been no $300,000.00 advance made. That jury verdict, however, rests upon the very testimony that is here being challenged. Respondent's argument that the evidence is admissible because the jury found in accordance with that evidence is an extraordinary one indeed, but demonstrates rather graphically the absence of any valid support for the decision.

VI

CONCLUSION

Apart from the obvious economic individual consequences to Petitioner from the instant decision of the Court of Appeals, we respectfully submit that the said decision, if allowed to stand, would have consequences reaching far beyond the instant litigation.

As noted above, the said decision would inevitably be cited in the future as authority for at least two fundamental points: 1. A trial court may, without any motion being before it, take from the jury whatever part of a case it chooses, even prior to the introduction of any evidence whatsoever in the case. 2. Either party to a contract which is in violation of the Robinson-Patman Act may, without reference to the extent of "guilt" recover quadruple damages from the other party—depending only upon who sues first!

We respectfully submit that such "rules" do violence to the basic principles of law on the subject heretofore established by this Court and the Courts of Appeals. In our Petition for Writ of Certiorari we cited a number of such decisions. Respondent's reply ignores those decisions, for obvious reasons.

We respectfully urge this Court to grant the writ as prayed.

Dated, San Francisco, California,
October 13, 1971.

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